Supreme Court, U.S.
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No. 99-139

In The
Supreme Court of The United States
October Term 1998

MICHAEL JOHN WARN, et al.,
Petitioners,

v.

M/Y MARIDOME, et al.,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Ninth Circuit

REPLY TO THE BRIEF IN OPPOSITION

MATTHEW F. QUINT*
WILSON & QUINT
GEORGE L. SCHRAER (Of Counsel)
655 Montgomery Street, 12th Floor
San Francisco, CA 94111
(415) 288-6700

Attorneys for Petitioner
**Counsel of Record*

APPELLATE ADVANTAGE
POST OFFICE BOX 7506 ◆ KANSAS CITY, MO 64116 ◆ 888-453-2424

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"The facade of the operation must be considered as minor, compared with the real nature of the operation and a cold objective look at the actual operational contacts that this ship and this owner have with the United States."
Hellenic Lines, Ltd. v. Rhoditis (1970) 398 U.S. 306, 310.

SUMMARY OF ARGUMENT

The Petition should be granted for three reasons. First, the case was wrongly decided. The shipowner in this case is Mexican. The District Court's factual findings establish a United States base of operations as a matter of law. The Maridome's British flag was thus part of the "facade of the operation" since it reflected neither the vessel's ownership nor its base of operations and was selected solely for tax-haven reasons. The Ninth Circuit opinion in this case violates both the holding and the principles of *Rhoditis* by making the facade of the operation more important than the Respondents' actual operational contacts with the United States.

Second, Respondents' assertion that the Ninth Circuit decisions applying the *Lauritzen-Rhoditis* standards are consistent with the opinions of other circuits and state courts is demonstrably untrue. While the Ninth Circuit continues to hold that "the law of the flag presumptively governs" (Apdx. B-65), courts in other Circuits and states read *Rhoditis* to hold, and hold themselves to the contrary, that the law of the vessel's base of operations usually takes precedence. The Petition should be granted so that this court can resolve this conflict and provide the courts below with needed guidance in how to weigh the *Laurtizen-Rhoditis* jurisdictional factors.

Third, the Petition should be granted so that this Court can address the relevance of flags of convenience to the *Laurtizen-Rhoditis* jurisdictional analysis. Petitioners assert that flags of convenience should be entitled to little weight in the jurisdictional analysis because they are part of the facade of a vessel's operation. Respondents apparently contend, to the

contrary, that a vessel's flag should be entitled to great weight, even though it is a flag of convenience. This Court has never before addressed this issue; there is little lower court authority on the subject of flags of convenience; and the Circuit and District courts below avoided the issue entirely in rendering their decisions.

ADDITIONAL RELEVANT FACTS

Respondents recitation of the proceedings in Greece is incomplete and misleading. The Maridome was never arrested in Greece. It fled the jurisdiction with criminal proceedings pending against it before the arrest warrant could be served. None of the Petitioners in this action ever obtained any security against the Maridome or its owners in Greece, and only one of the three Petitioner families ever attempted to proceed against Respondents in Greece. Petitioners sued and arrested the Maridome the only place they could find it, in the United States.

THE RECORD ESTABLISHES A UNITED STATES BASE OF OPERATIONS

A ship has a base of operations in the U.S. if both the vessel and the shipowner have "substantial and continuing contacts" with this country. *Rhoditis*, 398 U.S. at 310. A vessel's base of operations is where the "day-to-day operational decisions" are made, the location where "the day-to-day operation was conducted and supervised" and not the base of the owner who only is "involved in monitoring and controlling the overall operations. "*Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82, 88 (9th Cir. 1980)[emph. added].

The district court found that the Maridome's agent, Peter Lee, "...managed the Maridome out of his home in Virginia. MML provided Lee with a power of attorney which allowed him to manage all aspects of the Maridome, save selling or mortgaging it." (Apdx. 15). "In fact, MML's agent managed the day-to-day operations of the corporation's largest asset, the

Maridome, from an office in the United States"[emph. added] (Apdx. A-16,17).

Since the vessel's base of operations is the location from which "...the day-to-day operation was conducted and supervised", the District court's finding that Lee managed the day-to-day operations from the United States is dispositive. It compels the conclusion that the vessel's base of operations was the United States. *Phillips*, 682 F.2d at 88.

The District Court further found that Lee's management activities were pervasive and all-encompassing, that Lee was paid $100,000 annually for his services and that he continued managing the Maridome until just two days before the accident. (Apdx. A-6, 7).[1]

Respondents' assertion that Lee's management was limited to collecting mail and forwarding accountings simply ignores the District Court's contrary findings regarding the Maridome's United States' base of operations which included thirty hour per week U. S. management, U.S. banking [2], insurance brokers, suppliers, satellite service, and U.S. installation of the Boston Whaler. (Apdx. A-7, 8). Indeed, the Maridome conducted all of its important commercial contacts through operations established in the U.S. and represented to all commercial entities with which it

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[1] Up to and through the date of the accident, Lee was the only individual legally authorized to act on the vessel's behalf. (Clerk's Record ("C.R.") 120, Exh. 2).

[2] At n.9 of their Opposition, Respondents wrongfully accuse Petitioners of misciting the evidence by asserting that the Maridome was funded from Molina's assets in the U.S. That is precisely what Molina testified -- that funds for the Maridome operations were provided from Molina's personal Texas bank account at NationsBank. (C.R. 118(2) at 57-59; C.R. 120, Exh 19).

interacted that it had an American base. Moreover, the Maridome retained its American base of operations long after the accident by continuing to operate under the American based commercial relationships Lee had established for the ship's supplies, insurance, address, banking, satellite communications, etc. These operations remain in the U.S. to this day.

There is no evidence in the record to support a contrary finding that the vessel's base of operations was either "on board" or in Mexico. Obviously, every ocean going vessel's operations are managed, to some extent, from the vessel itself. The Maridome travels the world. Under the erroneous "on board" approach, the Maridome's legal base of operations would change as it entered the waters of each different country, and it would have no legal base of operations for purposes of injuries incurred while in international waters. With respect to a Mexican base of operations, Respondents testified that neither the vessel's owner, Molina, nor his assistant in Mexico were ever involved in the day-to-day operations or management of the vessel. (C.R. 95 at 3; 120(1) at 55). Accordingly, Mexico cannot be the vessel's base of operations.

THE NINTH CIRCUIT'S OPINION IS INCONSISTENT WITH SECOND AND FIFTH CIRCUIT OPINIONS AS WELL AS STATE COURT OPINIONS

Contrary to Respondent's assertion, a clear conflict exists between the Ninth Circuit on the one hand and other Circuit and state courts on the other concerning the application of the eight-factor test established by this Court for determining whether United States law applies to the claims of foreign seamen. In particular, a conflict exists between the Ninth Circuit, which begins its analysis with the assumption that the law of the flag "presumptively governs" and the courts of the Second and Fifth Circuit (and the state of Florida) which begin their analysis with the assumption that the law of the vessel's base of operations controls, absent compelling facts to the contrary. While

Respondents deny that any such conflict exists, the District Court certainly recognized one: "Plaintiffs are correct that courts in the Second and Fifth Circuits have given greater weight to the shipowner's base of operations." (Apdx. A-25, n. 6).

Respondent's refusal to acknowledge the Ninth Circuit rule that "the flag presumptively controls" (Opp. at 5) is particularly puzzling in light of the Ninth Circuit's description of its own decision in *Pereira v. Utah Transport Inc.*, 764 F.2d 686 (9th Cir. 1985): "holding that the Jones Act was inapplicable despite a United States base of operations because the law of the flag presumptively governs..." (Apdx. B-65).

The law in the Fifth Circuit could not be more explicitly to the contrary. "The determination of whether American or foreign law applies turns substantially on the base of operations of the vessel owner. Gonzales v. Naviera Neptuno, 832 F.2d 876 (5th Cir. 1987)." *Hernandez v. Navierra Americante CA*, 716 F.Supp 939, 943 (E.D. LA. 1989).[3]

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[3]Respondents' assertion (Opp. at 7, n. 4) that courts within the Fifth and Second Circuit have held that other factors may outweigh a United States base of operations is incorrect. Neither of the cases cited by Respondents, *Fajardo v. Tidewater, Inc.*, 707 F.2d 858, 5th Cir. (1983) (per curiam), *overruled in part on other grounds by In Re: Air Crash Disaster Near New Orleans, LA., 821 F.2d 1147 (5th Cir. 1987)* (en banc) nor *Ioannides v. Marika Maritime Corp.*, 928 F.Supp 374 (SDNY 1996) support Respondents' assertion. No United States base of operations was found in *Fajardo* because the defendant vessel had never visited U.S. waters. As the *Fajardo* court correctly noted, "the 'close objective look' at the 'actual operational contacts' which is demanded of us by *Rhoditis* must be directed at both the shipowner and at the ship [emphasis in original]. *Fajardo*, 707 F.2d at 862. *Ioannides* dealt entirely with forum non-conveniens issues, not jurisdiction under the Jones Act. There was no finding or holding in *Ioaniddes* that the Jones Act would not apply in the event of a U.S. base of operations.

Like the courts in the Fifth Circuit, state courts have expressed the belief that *Rhoditis* requires the exercise of Jones Act jurisdiction where a substantial United States base of operations has been established.

> "We think that *Rhoditis* establishes the rule that existence of substantial contacts including the existence of an extensive base of daily operations in the United States -- even when they are less significant than those present here -- itself and alone requires the application of our law to the particular case. This is shown by a series of decisions which so hold, even after a mandated consideration of all the pertinent factors has yielded an overwhelming predomination to the contrary."

Rojas v. Kloster Cruz A/S, 550 So.2d 59, 63 (Fla.App. 1989)

Petitioners are not suggesting an inflexible standard, as Respondents contend. Petitioners simply advocate the jurisdictional approach adopted by the Second and Fifth Circuits, and the Florida State courts. It is the Ninth Circuit's approach which inflexibly gives precedence to the law of the vessel's flag whether or not the flag bears any relation to the vessel's ownership or operations.[4]

FLAGS OF CONVENIENCE SHOULD BE ACCORDED LITTLE WEIGHT IN THE JURISDICTIONAL ANALYSIS

Post-*Rhoditis* decisions have established that a vessel's flag and

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[4] Respondents cite *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82 (9th Cir 1980) as an example of a case where the Ninth Circuit did not mechanically apply the law of the flag. It is more than a little curious that, in *Phillips*, the court used the existence of a foreign base of operations to deprive foreign seamen on an American flagged vessel of access to American courts. This is precisely the type of result-oriented decision making which this court should address by explicating the proper method of analyzing the *Lauritzen/Rhoditis* jurisdictional factors.

its base of operations are the two weightiest factors. Giving great weight to the flag where it reflects either the vessel's true ownership or its base of operations is sensible. However, if, as here, the flag represents neither the vessel's actual ownership nor its base of operations, then it is nothing more than part of the "facade" of the operation which "must be considered as minor." *Rhoditis*, 398 U.S. at 310. In such a case, the rule established in the Fifth Circuit should apply: The choice of law should turn "substantially on the base of operations of the vessel owner." *Hernandez*, 716 F.Supp. at 943.

No federal court, to the best of Petitioners' knowledge, has defined "flag of convenience." Contrary to Respondents' assertion that the District and Circuit courts determined (*sub silentio?*) that the Maridome's was not a flag of convenience, neither court addressed the issue at all. Under Tetley's definition, the Maridome flies a flag of convenience because it flies the flag of one country while being owned and operated from others. (Pet. at 23). Respondents argue that the Maridome's flag does not meet the definition established by the commentators they rely upon (Opp. at 14-15).[5]

Regardless of whose definition is applied, the relevance of flags of convenience to the choice of law analysis is that the flag should be given little weight where, as here, it is part of the facade of the operation, i.e. where it does not reflect either the vessel's

[5]In fact, the Maridome does meet Respondents' commentors Robertson & Speck's definition: the flag of a country in which the owner registers a ship to avoid, *inter alia*, U.S. taxes. (Opp. at 14-15). In this case Molina admitted he established the Maridome in the Channel Islands specifically because they were a tax haven. (CR 118 (2) at 24).

ownership or its operational base.[6] The lower courts clearly need guidance on this issue. It is all well and good to espouse a "flexible" test, but an overly flexible test leads to inconsistent, result oriented, essentially standardless decision making. Unfortunately, that is the present state of Jones Act jurisprudence under *Lauritzen/Rhoditis*. Different courts have adopted different presumptions with which to begin the analysis. Not surprisingly, those presumptions have led to inconsistent results in cases presenting substantially similar facts.[7]

This case is virtually indistinguishable from *Rhoditis* on its facts, except for the location of the injury ("not emphasized", *Villar*, 782 F.2d at 1480) and the absence in this case of any foreign employment contract (also of minor weight). Respondents' attempt to draw a material distinction between commercial and

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[6]The Circuit Court below had no difficulty finding that the actual shipowner was Mexican citizen Molina, not the shell Channel Islands corporation he established with $2 of paid-in capital. (Apdx. B-64). (C.R. 120, Exh. 1 at 1-3). Respondents' assertion that the shell corporation was "fully capitalized" and "observed the necessary corporate formalities" (Opp. 2, n.1) is puzzling. One may legitimately ask how a entity with $2 of total capitalization could purchase a $22.5 million yacht, without a mortgage, in the absence of egregious commingling of funds between the shell entity and its true owner.

[7]See, e.g., the cases cited at n. 1 of the Petition, all of which held the Jones Act applicable where foreign seamen sailing on foreign flagged vessels were injured in accidents occurring outside the United States. There simply is no reasoned basis upon which the injured seamen in each of those cases could have been permitted to assert claims under U.S. law while denying Petitioners herein the same right.

pleasure crafts will not hold water.[8] Their claim that the Maridome is simply a pleasure yacht for Molina's personal enjoyment ignores how wealthy executives like Molina do business and is not supported by the record. While the Maridome may be a pleasure yacht, it also serves as an executive suite for Molina's business activities. Molina is the C.E.O. of a New York Stock Exchange Company. He uses the Maridome to entertain high ranking U.S. business executives and bankers. It is naive and unrealistic for Respondents to argue that such activity does not constitute "business activity" or "commerce" at the highest corporate levels. It is certainly no accident that the Maridome made twice as many visits to U.S. ports as to the ports of any other country during the relevant period of time. (C.R. 115 at 2).

Finally, Respondents have misconstrued Petitioners' policy argument. Petitioners do not assert that foreign seamen should have the same rights as American seamen or that all foreign seamen should have access to U.S. courts. Petitioners simply contend that when foreign vessel owners decide to base their operations in the United States and thereby reap all the advantages of U.S. based management, banking, and commercial relationships of every conceivable description, they should be held answerable under U.S. law for injuries they cause to their seamen, whether American or foreign. To hold to the contrary that U.S. based vessels can avoid Jones Act jurisdiction by hiring foreign seamen only provides a disincentive to hire Americans that is contrary to the policy of the Jones Act.

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[8]The lack of cited cases involving pleasure yachts is easily explained. There are relatively few pleasure yachts making trans-oceanic voyages in comparison with commercial vessels. However, the relative infrequency of such voyages is no reason to carve out a special rule for seamen on pleasure yachts. The Jones Act is for the benefit of seamen without regard to the type of vessel that employs them.

CONCLUSION

Petitioners respectfully submit that their petition should be granted for each of the reasons set forth in the petition and reply.

Respectfully Submitted,

Matthew F. Quint (Counsel of Record)
WILSON & QUINT, LLP
George L. Schraer (Of Counsel)
655 Montgomery Street, 12th Floor
San Francisco, California 94111
Telephone (415) 288-6700
Attorney for Petitioners